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No. 82-1471

In The

Supreme Court of the United States

October Term, 1982

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Petitioner,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF MISSOULA, AND HAVRE FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondents.

BRIEF OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, IOWA, LOUISIANA, MAINE, MASSACHUSETTS, MINNESOTA, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Pages
I. Introductory Statement	1
II. Opinions Below	2
III. Interest of Amici Curiae	2
IV. Argument	3
V. Conclusion	8

TABLE OF AUTHORITIES

CASES:

Bank of Texas v. Childs, 615 S. W. 2d 810 (Tex. 1981)	7
Bartow County Bank v. Bartow County Board of Tax Assessors, 285 S. E. 2d 920 (Ga. 1982)	7
Hamilton Co. v. Massachusetts, 6 Wall. 632 (1867)	3
Memphis Bank & Trust Company v. Riley C. Garner, — U. S. —, 51 U. S. L. W. 4104, 4105 (January 1983)	6, 7
Provident Institution for Savings v. Massachusetts, 6 Wall. 611 (1867)	3
Society for Savings v. Coite, 6 Wall. 594 (1867)	3

STATUTES:

Sections 15-31-101 and 15-31-143 (1), Montana Code Annotated	3
12 U. S. C. § 1433	6
12 U. S. C. § 1725 (e)	6

TABLE OF AUTHORITIES—Continued

Pages

12 U. S. C. § 2055 6

12 U. S. C. § 2079 6

12 U. S. C. § 2134 6

26 U. S. C. 1 et seq. 4

31 U. S. C. § 742 ..... 3, 4, 5, 6

31 U. S. C. § 769 6

31 U. S. C. § 3124 4

OTHER AUTHORITIES:

United States Supreme Court Rule 36.1 1

United States Supreme Court Rule 36.4 2

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I. INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 36.1, the signatory states submit this Brief as *Amici Curiae* in support of the Petition for a Writ of Certiorari in the above-captioned case (docketed March 4, 1983, 51 U. S. L. W. 3669). Since this Brief is being sponsored and filed

by the aforementioned states, consent to its filing is not required. United States Supreme Court Rule 36.4.

II. OPINIONS BELOW

The Opinion of the Supreme Court of the State of Montana is reported at — Mont. —, 654 P. 2d 496 (1982). Copies of the Opinion, the Supreme Court of Montana's denial for a petition for rehearing, and the unreported Opinion of the District Court for the First Judicial District of the State of Montana are contained in Petitioner's Appendix, pp.: 1a-27a.

III. INTEREST OF AMICI CURIAE

The interest of the states joined as Amici in this Brief revolve around what is believed to be the far reaching effects of the opinion of the Montana Supreme Court as it relates to the question of including federal obligations within the measurement of a state franchise tax.

The finding of the Montana Supreme Court that a nondiscriminatory franchise tax may not include within its measure interest income from federal obligations, clearly has serious consequences for states other than Montana. As the argument contained herein will demonstrate, such a position is not consistent with the previous decisions of this Court. It is essential that this Court agree to hear this Petition so as to provide guidance to states in this area.

IV. ARGUMENT

It is apparent from a reading of the Petition that the Montana tax, Sections 15-31-101 and 15-31-143 (1), Montana Code Annotated, see Petition, p. 3, constitutes a nondiscriminatory franchise or other nonproperty tax imposed on corporations. As such, this Brief will only discuss that portion of the petition specifically relating to the interpretation to be given to the exemption language contained in the federal statutes.

Congress and this Court have set certain standards which limit the ability of a state to subject federal obligations to either property or franchise taxes. Since the enactment of 31 U. S. C. § 742 in 1862, this legislation contained the parameters under which states could tax federal obligations. The statute as originally enacted provided as follows: "All stocks, bonds, and other securities of the United States held by individuals, corporations, or associations within the United States shall be exempt from taxation by or under state authority." In interpreting that prohibition, this Court found specifically that the exemption contained therein did not prohibit a state from including federal interest income within the measure of a franchise tax. *Society for Savings v. Coite*, 6 Wall. 594 (1867); *Provident Institution for Savings v. Massachusetts*, 6 Wall. 611 (1867); *Hamilton Co. v. Massachusetts*, 6 Wall. 632 (1867). As countenanced by this Court a nondiscriminatory franchise tax, which constituted a tax on the privilege of doing business and not a tax on the income, could include within its measure the interest from federal obligations. Effectively, the income which could

not be taxed directly because of the prohibition contained in Section 742,[1] could be included indirectly[2] in a franchise tax.

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[1]Revised and recodified as 31 U.S.C. § 3124 on September 13, 1982 by P. L. 97-258 as follows:

§ 3124. *Exemption from taxation.*

(a) Stocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax, except—

(1) a nondiscriminatory franchise tax or another nonproperty tax instead of a franchise tax, imposed on a corporation; and

(2) an estate or inheritance tax.

(b) The tax status of interest on obligations and dividends, earnings, or other income from evidences of ownership issued by the Government or an agency and the tax treatment of gain and loss from the disposition of those obligations and evidences of ownership is decided under the Internal Revenue Code of 1954 (26 U. S. C. 1 et seq.). An obligation that the Federal Housing Administration had agreed, under a contract made before March 1, 1941, to issue at a future date, has the tax exemption privileges provided by the authorizing law at the time of the contract. This subsection does not apply to obligations and evidences of ownership issued by the District of Columbia, a territory or possession of the United States, or a department, agency, instrumentality, or political subdivision of the District, territory, or possession.

[2]The Judiciary Report of the House of Representatives No. 97-651 (July 21, 1982), explains the purpose of the revision at p. 3:

Purpose.—The purpose of the bill is to restate in comprehensive form, without substantive change, certain general and permanent laws related to money and finance and to enact those laws as title 31, United States Code. In the restatement, simple language has been substituted for

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In 1959, Congress amended Section 742 so as to incorporate into the body of the statute itself the interpretation of it as given by this Court. Added in the 1959 amendment was the second sentence so that Section 742 reads in its entirety as follows:

> *Exemption from taxation.* Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate or inheritance taxes.

Since 1959, both by the interpretation of Section 742, as well as by Congressional mandate, any state which levied a nondiscriminatory franchise tax could include therein interest from federal obligations.

The problem in this case arises however, because of certain language contained in statutes creating certain

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> awkward and obsolete terms, and superseded, executed, and obsolete laws have been eliminated.

as well as substantive changes from § 742 at p. 94:

> In subsection (a), before clause (1), the words "Except as otherwise provided by law, all . . . bonds, Treasury notes, and other" are omitted as surplus. The words "political subdivision of a State" are substituted for "municipal or local authority" for clarity and consistency. The word "applies" is substituted for "extends" for clarity. *The words "directly or indirectly" are omitted as surplus.* In clause (1), the word "instead" is substituted for "in lieu" for clarity. (Emphasis added.)

federal obligations, *i. e.*, 31 U. S. C. § 769 (United States Treasury Bills); 12 U. S. C. § 1433 (Federal Home Loan Bank Notes), 1725 (e) (Federal Savings and Loan Insurance Corporation Notes), 2055 (Federal Land Bank Obligations), 2079 (Federal Farm Credit Bank Securities), and 2134 (Federal Home Loan Stock Dividends), which prohibits this particular federal income from being included within any form of state taxation. As noted in the Petition, this Court in *Memphis Bank & Trust Company v. Riley C. Garner*, — U. S. —, 51 U. S. L. W. 4104, 4105 (January 1983), at footnote 5 identified the exact issue presented here, as one which has never been addressed by it:

> In establishing the Federal Credit Bank, Congress made clear that the obligations of these banks would be immune from taxation by the States. 12 U. S. C. Sections 2055, 2079, and 2134. We have no occasion to determine whether the immunity described in these provisions is broader than that otherwise provided by 31 U. S. C. Section 742. . . .

Now this Court can specifically address this issue and find, as urged by the Petitioner, that the exemption language contained in the specific statutes does not preclude a state from including within the measure of a nondiscriminatory franchise tax, that specific federal interest income.

As the Petition has pointed out, the ability of states to tax either directly, or indirectly through a franchise or other nonproperty tax, federal interest income has in recent years come under continued question. A form of tax known as a "bank shares tax" is one method utilized by states to tax financial institutions and includes within

the base of the tax federal obligations themselves. Two cases are presently before the court, *Bank of Texas v. Childs,* 615 S. W. 2d 810 (Tex. 1981), cert. granted sub. nom. and *Bartow County Bank v. Bartow County Board of Tax Assessors,* 285 S. E. 2d 920 (Ga. 1982), appeal docketed No. 81-1834, (April 5, 1982), which directly address the question of whether or not federal obligations may be included in a bank shares tax. Since this Court has agreed to decide those cases, states which have elected that method of taxation will have definitive guidance on the question.

Other states, including the *Amici,* have elected to include the value of federal obligations within the measure of a franchise tax. As a result of the recent decision of this Court in *Memphis Bank & Trust Company, supra,* the states realize that in order to be permissible a franchise tax must be nondiscriminatory. With the present case comes a more fundamental issue: notwithstanding that a state levies a nondiscriminatory franchise or other non-property tax in lieu thereof on corporations, does the tax exempting language contained in certain statutes of issuance preclude a state from including federal interest income within the measure of a franchise tax?

This issue affects not just the State of Montana, but affects all states attempting to enact permissible franchise tax legislation which includes federal interest income in its measure without violating Congressional guidelines.

———o———

V. CONCLUSION

This issue is of vital concern to the *Amici* and represents a question having nationwide impact in the field of state taxation. Therefore, we urge this Court to grant the Petition for a Writ of Certiorari in the present case and give plenary consideration to the matter.

Respectfully submitted,

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